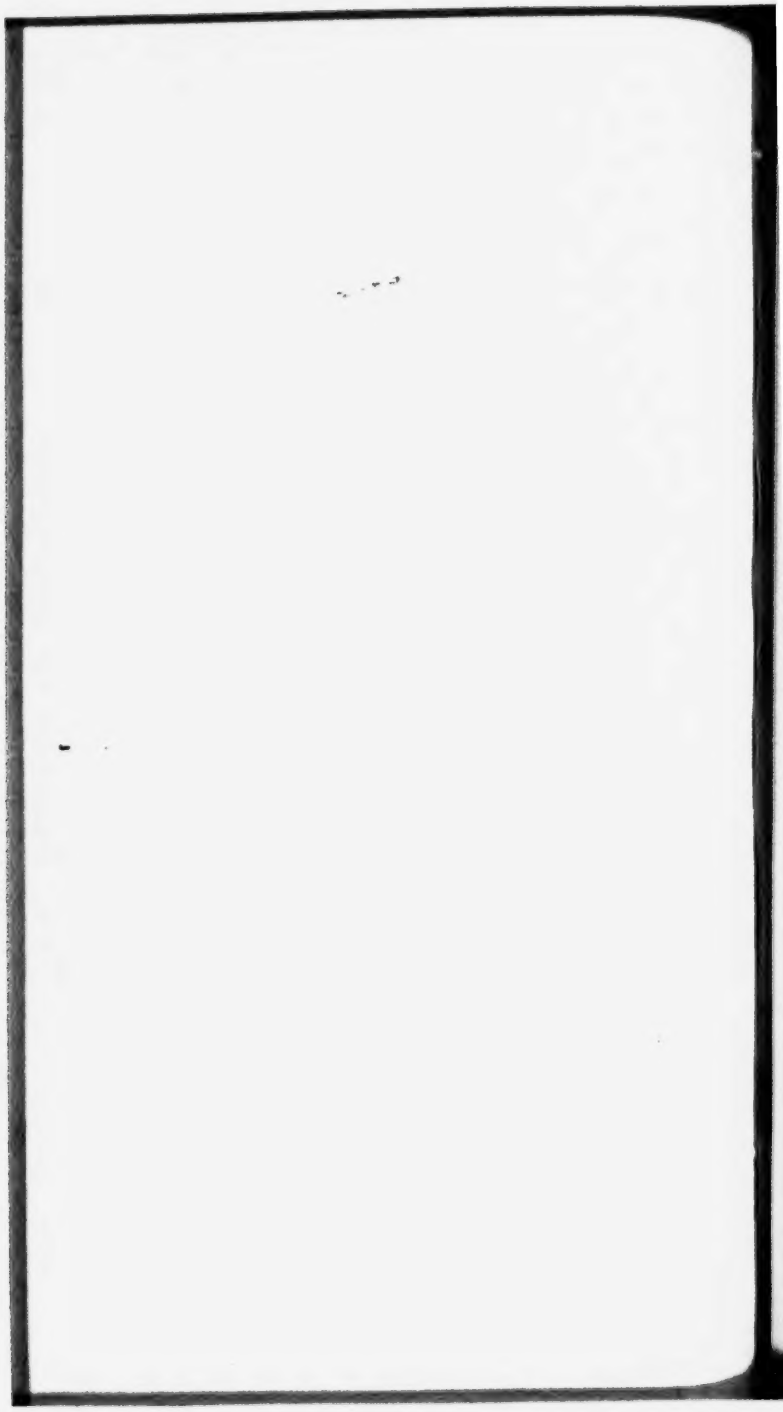

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 49

No. 50

FORD MOTOR COMPANY, *Petitioner*,

vs.

GORDON FORM LATHE COMPANY, *Respondent*.

PETITION FOR REHEARING

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No. 50

FORD MOTOR COMPANY, *Petitioner*,

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GORDON FORM LATHE COMPANY, *Respondent*.

PETITION FOR REHEARING

Petitioner respectfully petitions this Court for rehearing.

Petitioner filed its petition for writ of certiorari herein and originally presented seven questions for consideration to this Court. On June 7, 1943, this Court granted the petition for writ of certiorari but limited the writ solely to the first question. Petitioner filed its petition for re-hearing as to Points 2 and 3, which petition was duly granted by this Court on June 21, 1943. The case was argued on November 8th and 9th. On December 6th the following entry was made in the case:

> "*Per curiam*: The judgments are affirmed by an equally divided court. Mr. Justice Murphy took no part in the consideration or decision of these cases."

In its original Petition for Certiorari and Brief in support thereof petitioner urged upon this Court that the questions involved were of far-reaching public importance; that Point 1 presented a question never directly ruled upon by the Court; that as to Point 2 the decision of the Court below constituted a departure from the rule enunciated by this Court many years ago in *Tilghman v. Proctor,* 125 U. S. 136, and that, as to Point 3, the Sixth Circuit Court of Appeals had decided a Federal question in direct conflict with the appropriate decisions of this Court in *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.,* 235 U. S. 641; *Mason v. Graham,* 90 U. S. 261; *Westinghouse v. Wagner,* 225 U. S. 604, and *Sheldon v. Metro-Goldwyn-Mayer,* 309 U. S. 390, and also in conflict with its own decision in *Egry v. Standard Register Co.,* 23 F. 2d, 438.

As the Court was equally divided, the *per curiam* opinion which affirmed the judgment below leaves these questions of great public importance still entirely unreviewed.

The following are the three points as presented in our petition, and as to which this petition for rehearing is submitted:

Point 1. On the proposition that a patentee after making a compromise agreement with an infringing manufacturer may rely upon *Birdsell v. Shaliol,* 112 U. S. 485, to mulct innocent customers of such manufacturer of much larger sums than any recovery obtainable from the manufacturer.

Point 2. On the proposition that an infringer is liable for *actual* and not *possible* gains.

Point 3. On the proposition that respondent offered no proof to show what part of petitioner's alleged gains were due to respondent's patent, and what to patentable improvements thereon not the property of respondent, whereas, petitioner's evidence did so discriminate.

POINT 1. ON THE PROPOSITION THAT A PATENTEE AFTER MAKING A COMPROMISE AGREEMENT WITH AN INFRINGING MANUFACTURER MAY RELY UPON *BIRDSELL V. SHALIOL*, 112 U. S. 485, TO MULCT INNOCENT CUSTOMERS OF SUCH MANUFACTURER OF MUCH LARGER SUMS THAN ANY RECOVERY OBTAINABLE FROM THE MANUFACTURER.

The facts in connection with Point 1 briefly are that petitioner purchased in the open market from a manufacturer known as the Walcott Company, certain lathes particularly designed for the machining of automobile camshafts; that after these had been purchased, lathes of exactly similar construction made by the same manufacturer, the Walcott Company, were held in *Gordon Form Lathe Co. v. Walcott Machine Co.*, 32 F. 2d, 55, by the Sixth Circuit Court of Appeals to constitute an infringement of the Gordon and Redlin patent in suit. After the return of the mandate in that case by the Court of Appeals to the District Court, a judgment was entered containing the following paragraph:

"6. It being represented to the Court that the defendant is not financially able to respond to a money judgment for damages and/or profits, no account-

> ing is ordered, but, on the contrary, it is ordered that the plaintiff recover of the defendant nominal damages in the sum of one dollar ($1.00) without reference to a Master" (R. 1671).

In addition the Decree (Par. 8, R. 1672) provided for a recovery of $4,000 as costs.

Since that Decree was prepared by counsel for respondent, who consented to its entry, the Decree was to all intents and purposes a voluntary compromise designedly entered into for the specific purpose of enabling respondent to rely upon the case of *Birdsell v. Shaliol, supra,* and proceed against innocent purchasers of the infringing machines and mulct them of much larger sums than any recovery that could have been obtained from the real tort feasor, the *manufacturer* of the infringing machines.

Respondent in oral argument, and also in its brief, urged that this Court could take judicial notice of the usual practice of the courts of having counsel for the prevailing party prepare the decree; and that no other course was open to it in this respect. It urged upon this Court that whatever representations were made to the District Court concerning the financial inability of the defendant, the Walcott Company, were not made by counsel for respondent but by counsel for Walcott. We submit that the losing party to any lawsuit may not avoid the entry of a judgment against him by stating to the court that he has not money enough to satisfy such judgment and that the Decree for nominal damages, entered in the *Walcott* case, could never have been entered except upon motion of counsel for respondent, the Gordon Form Lathe Company.

We argued to the Court that we were not asking this Court to overrule the case of *Birdsell v. Shaliol* and we pointed out that the case does not apply to the situation here presented because in that case the decree for nominal damages entered in the earlier action by Birdsell against the Ashland Machine Company, the manufacturer of the infringing machines, was purely *involuntary* as far as Birdsell or the Birdsell Mfg. Company was concerned. The situation was not at all similar to that in the instant case. Birdsell, the plaintiff in the earlier case against the Ashland Machine Company, had failed to join his licensee, the Birdsell Mfg. Company, and the case having been referred to a Master for an accounting before whom the damages of Birdsell's licensee, the Birdsell Mfg. Company, were proved, he reported that no profits had been made by defendant, that if any damages were sustained, they were sustained by the Birdsell Mfg. Company, a stranger to the suit, and recommended a decree for nominal damages only. This is far different from the parties to the original action, or counsel for the parties, as here, *consenting* to the entry of a decree for nominal damages.

We do not challenge the correctness of the decision in the *Birdsell* case to the situation there presented. We do, however, urge that this Court did not intend in *Birdsell v. Shaliol* to establish an inflexible rule of law that must be followed in all cases irrespective of the situation presented in any particular case, and to the effect that if a decree for nominal damages is entered against the real wrongdoer (the manufacturer of an infringing machine who sells his machines in the open market), the patentee may then proceed against any member of the public who purchased one of the infringing machines in good faith and recover from such purchaser a sum not only greater

than any recovery that could have been obtained from the real tort feasor; a sum much greater than the value of the invention as used by the patentee and a sum even greater than the entire market value or sales price of either the patented or the infringing machine.

Although in our system of jurisprudence the decided cases stand as precedents from which authoritative rules of law are established, it is axiomatic that each case must be judged upon its own particular state of facts. Although the grant of a patent gives to a patentee the exclusive right to make, use and vend his invention and also a right of action for infringement upon the right granted by the patent, a patent infringement action, whether brought in law or in equity, is analogous to an action under general property law for wrongful appropriation or conversion. This analogy was recognized in the *Birdsell* case wherein it was stated that the

> "owner of a chattel, which others have taken from him and converted to their own use, is not deprived of his property * * * without actual satisfaction by somebody"

and that in England

> "upon technical grounds, the owner of a chattel who has recovered judgment for its value in trover against one of two joint tort-feasors, cannot, although that judgment remains unsatisfied, bring a like action against the other for the same cause."

As we read the *Birdsell* case, the Court then based its decision on the following:

> "By our law, judgment against one joint trespasser, without full satisfaction, is no bar to a suit against another for the same trespass." Lovejoy v. Murray, 3 Wall 1.

Although we do not question the correctness of the decision in the *Birdsell* case in the situation there presented, we do not think that the reference to an action of trover or the questions which were propounded to us by the Court in oral argument concerning the purloining of a horse is quite analogous to the case of patent infringement. Indeed the patent statutes specifically provide for the recovery of damages for infringement by *action on the case.* (R. S. 4919; 35 U.S.C.A. 67.) And also provides for the equitable action in which profits may be recovered. (R.S. 4921; 35 U.S.C.A. 70.)

If comparison to general property law is to be made, we submit the following to be more analogous:

Assume an ordinary tort action of trespass on the case where a trespasser goes on another's land and cuts timber which the owner had made a practice of permitting others to cut for 10 per cent of the sales price per cord. If there were a statute with respect to the conversion of timber that permitted an action to be brought in equity for the recovery of either profits or damages, certainly the amount of recovery could be no greater than the profits which the trespasser had made or the amount of damages, from lost sales, inflicted upon the owner of the property. To complete the analogy to the instant case, assume the original trespasser sold the timber which had some peculiar property which enabled him by impregnating it, let us say with two different substances, to make a quarter of a cord furnish the heat that would be furnished by a full cord of the untreated wood.

Could it be possible in the case assumed that if the owner of the land and timber found the original trespasser to be indigent he might consent to a decree for nominal damages against such trespasser and then proceed to recover the savings which each and every user made in his

fuel bill by the use of the wrongfully appropriated wood? In view of the language we have quoted above from *Birdsell v. Shaliol,* he clearly could not have done so under the law of England even if, instead of agreeing to the entry of a judgment for nominal damages, he had obtained a substantial money judgment which remained unsatisfied.

We most earnestly submit that the situation in the instant case is more analogous to *McBride v. Scott* 132 Mich. 176, 93 N. W. 243 than it is to the *Birdsell* case and under the rule of *Tompkins v. Erie,* 304 U. S. 64, the *McBride* case is controlling and therefore the consent decree entered in the *Walcott* case should have the same legal effect as the reservation of the right to sue attempted in the *McBride* case.

Although we do not believe the law of patents is *sui generis* there is perhaps one thing unique about it and that is the tendency of the Courts to refer to any defendant, found guilty of patent infringement, as a "tort feasor" a "wrong doer" the "guilty party" a "trustee *ex malificio.*" In most of the cases, however, in which these expressions are used they are applied to the real *tort feasor.* To consider that any member of the public who might be placed in the same situation as petitioner in this case is a wrong doer and a guilty party would be subversive of all sound principles of equity and justice. Indeed, it would not even be good common sense. This sort of an approach to the position of defendant in a patent infringement was well discussed by Judge Learned Hand in the case of *Cincinnati Car Co. v. New York Rapid Transit Co.,* 66 F. 2d, 592, to which, as it is most pertinent, we earnestly direct the Court's attention wherein Judge Hand stated

> "Patent infringement often involves nice and casuistical questions which it is mere artifice to treat as involving moral delinquency." (66 F. 2d, 593.)

We submit it to be a self-evident proposition that the patent infringer in all cases cannot in equity and justice, be treated as a "trustee *ex malificio* and therefore subject to the severe standard imposed upon malversators."

It is no answer to say, as pointed out by Judge Hand, that the patentee "is a victim and the infringer a *tort feasor*" because "the character of the *tort*" (particularly in a case such as the instant one) "ought not really to have such sanguinary results."

To what extent was the respondent here victimized by petitioner? It was given every possible opportunity to prove the value of its invention by the Ford Motor Company which, assisted by respondent, struggled for months to make a Gordon machine, an exact replica of the one shown in the patent, do its intended work. Petitioner was not only ready, but willing, to buy respondent's machines and it would have done so had they proved to be commercially practical machines instead of a complete failure on petitioner's work (R. 619).

The record clearly establishes that respondent never asked for or received a royalty for the *use of the patented* machines but sold them outright for a lump sum (R. 280-281) It further shows that on each and every machine sold by the respondent a royalty of 10 percent was paid to the patentee. The witness Gordon, respondent's president and *alter ego*, had denied upon direct examination that any royalty was paid on the Gordon patented ma-

chines, (R 281) but when he was confronted with the books of his Company which clearly showed the 10 percent royalty payments he admitted that his testimony should be corrected. (R. 318). The payment of this 10 percent *was not, as stated by counsel for plaintiff in oral argument to this Court, a sales commission,* for, as clearly stated by the witness Gordon *"all of the selling was done through Motch & Merryweather and I was not directly connected with them."* (R. 317) The books of the Gordon Company showed that with respect to the machine which was delivered to, and attempted to be used, by petitioner, the Ford Motor Company, a sales commission of $653.25 was paid to Motch & Merryweather and a payment of $435.50 or 10% of the sales price of $4355.00 was paid as royalty to the Production Machine Tool Company (R. 318). The books also showed that all the time respondent was selling machines it was losing money (R. 315). Had respondent pursued its accounting against the Walcott Company, as respondent could not have proved any loss of profits, as damages, and, if, as the decree (R. 1671) asserts, the Walcott Company was "not financially able", the situation presented would have been one wherein the Court would of necessity been compelled to resort to the assessment of a reasonable royalty under the statute. The maximum recovery, therefore, which respondent could have procured insofar as petitioner's twenty-four machines are concerned, would have been 10 per cent of the total selling price ($108,745.60) of the twenty-four machines sold by Walcott to Ford (R. 162) or $10,874.56. Had this been paid petitioner's machines would have become fully licensed.

We submit that when consideration is given to the above facts, the conclusion is inescapable that respondent

did not have the slightest desire to pursue its remedy against Walcott, and that respondent resorted to the artifice of having a decree for nominal damages entered in order that it could collect huge sums to which it is clearly *not justly entitled under the statute.*

Respondent has urged that we are asking "the Court to emasculate the statutes"; and that "the dark and gloomy picture" which we "attempt to paint has not appeared in these more than one hundred and fifty years." We do not ask the Court to emasculate the statute but, quite to the contrary, we insist that the plain and unequivocal language as well as the spirit and intent of the statute be followed. There is no ambiguity in the provisions of Sec. 4921 of the statute which limits the profits which a complainant in a patent infringement suit may recover to those to which he "*is justly entitled.*" What are the profits to which a complainant is justly entitled in any patent infringement suit? Certainly they can be no more than those which the defendant would have earned by the use of the invention *per se,* without the addition of valuable improvements of others.

If, when Gordon attempted to sell his machine to the Ford Company, which the Ford Company found totally unusable, he had proposed that Ford would turn over to him all of the advantages, or savings, effected by the use of the Gordon patented machine as compared with the Ford Company's successful camshaft shaper (which had been used by the Ford company for years), then there might be a logical basis in the contention that the alleged savings effected by Ford in the use of the infringing machines are profits to which respondent is justly entitled. But Gordon did not make any such proposition when he

attempted to sell his *own machine* to petitioner. He offered to sell the machine outright for the sum of $4,355.00 (R. 317). No profit would have been realized upon this sale (R. 318) except that of the sum of $435.50, the 10 per cent royalty which was included in the price of the machine and which covered the manufacture and sale as well as the full and unrestricted use thereof for the entire life of the machine, or for the full seventeen year life of the patent, whichever would have proved to be the longer.

We submit the entry of the decree for nominal damages in the *Walcott* case obviously was part of a carefully premeditated scheme, the principal purpose of which was to enable respondent to press *unjust and unrighteous* claims for hundreds of thousands of dollars of profits to which respondent, was never, and is not now, justly entitled.

The case of *Birdsell v. Shaliol* was never intended by this Court to produce the monstrous inequity that will result to petitioner and the potentially great similar danger to the general public, if the judgment below is permitted to stand. The fact that the case relied upon has never before been used or relied upon to effect the result that was achieved in the instant case is no reason for assuming it will not be so used against other innocent members of the public in the future or that it will not stand as a precedent therefor if the course of conduct pursued in this case is to stand approved. We feel that we would be remiss in our duty if we did not ask this Court to reconsider the point as we can think of no doctrine which can have more far-reaching and injurious effects to the public interest which is "so seldom adequately represented in patent litigation." Any patentee who may have pro-

cured a patent on any type of a labor saving device that is used by the general public, an automobile, a tractor, a typewriter, an adding machine, to say nothing of the hundreds of thousands of production machines that are used in American industry, may agree with an infringing manufacturer of any of such machines that "representations" be made to a Court after a finding of validity and infringement which will result in the entry of a decree for nominal damages against the manufacturer so that the patentee may proceed against innocent purchasers of the machines and recover from them all of the alleged labor savings that might have accrued to them as the result of the use of the infringing machines which contained therein the patentable invention. Indeed this case now stands as a clear invitation to the Bar to advise all clients never to collect from an infringing manufacturer of labor saving machines *but always to pursue the users thereof for their profits.* Is a premium to be placed upon legal machinations that will permit the real wrongdoer to go scot-free in order that his customers may be victimized and a patentee enriched? Surely it would be a perversion of the patent system to place the entire industry of this country in a position where no manufacturer could dare to buy and use any labor saving machine except at his peril, or to place the seller of such a machine in a position such that in order to sell his product he would have to guarantee to pay an award that would be more than double the sales price thereof, or to give a save harmless *bond.*

POINT 2. ON THE PROPOSITION THAT AN INFRINGER IS LIABLE FOR ACTUAL AND NOT POSSIBLE GAINS.

On this point, the statute is perfectly clear that a plaintiff can recover first, profits only in the event the defendant has realized them, and second, that the profits realized be those "to which the complainant is justly entitled." (R.S. 4921; 35 U.S.C.A. 70.) There is no ambiguity about the language of the statute. Neither is there any ambiguity about the rule of law laid down by this Court in *Tilghman v. Proctor, supra.* That the rule of that case is still the law, is clear in view of the full quotation at 309 U. S. page 400 in the comparatively recent case of *Sheldon v. Metro-Goldwyn-Mayer, supra,* of the same language therefrom upon which we have relied herein. *Tilghman v. Proctor* stated that the profits for which an infringer is liable are "*for actual, not for possible gains, * * * not those which he might reasonably have made but those which he did make.*"

The factual situation here is perfectly clear: the Master found as a fact that petitioner had actually used an additional straightening operation for the infringing machines (R. 41). The District Judge did not discuss the point but rendered an oral opinion (R. 118 to 130) in which he limited his discussion to the question of overhead stating that he was going to affirm the Master as to every other finding. The Court of Appeals stated:

> "The Master found that the Ford Company used an additional straightening operation on the shafts after it began using the infringing Melling-Walcott

> machine and that the labor costs thereof was the amount claimed by the Ford Company in its accounting but he found that the additional operation was not attributable to the difference between the use of the infringing machines and the shaper." (R. Vol. V, p. 20)

The reason assigned by the Court of Appeals for sustaining the Master on this point was:

> "Every reasonable presumption is in favor of the Master's report as to profits made by an infringer based on oral testimony and his report is not to be set aside unless error clearly appears. We find no such error."

We submit that the Court below on the question of the straightening operation, is clearly in error. The Eighth Circuit Court of Appeals in dealing with a similar situation stated:

> "We realize that due weight should be given to the findings of a Master, especially on a controverted question of fact or the creditability of witnesses. Certainly the Master's report is not binding where certain legal principles have not been followed or have been misapplied or when the findings of the Master do not work out substantial justice between the parties. *In such a case we see no reason why the court should not review the entire matter. Indeed it is its duty so to do (Dowagiac v. Deere & Webber Co.*, C.C.A. 8, 284 Fed. 331, 345).*

The Master's report here is clearly one (a) wherein certain legal principles have not been followed; (b) wherein the findings of the Master do not work out substantial justice between the parties, (c) it is clearly erroneous and (d) therefore presents a case where it is indeed the duty of

*(Italics where used are ours unless otherwise noted.)

the Court to review the entire matter which was not reviewed by either the District Court, or the Court of Appeals. The District Court did not discuss the straightening operation, or pass specifically on petitioner's exception (Exception 11, R. 105, 106) to the Master's report on this question as it should have done *(Westinghouse v. Wagner supra,* 225 U. S. at 622). The opinion of the Court of Appeals does not indicate that the Court gave any independent consideration to the evidence on this point, but, on the contrary, indicates that the Court merely accepted the Master's conclusions. Hence there never was any real review of, or direct ruling upon, petitioner's exception.

That portion of the Master's report which has to do with this particular question is very brief (R. 40-42) and may be readily analyzed and checked against the pertinent testimony. Analyzing the report it will be seen that the Master reached the following clearly erroneous conclusions which prompted him to reject the straightening operation as an element of cost, each of which we will show are either not supported by the record evidence, or constitute a failure to follow established legal principles:

1. He stated that "it appears that standards of workmanship in manufacturing the Model T were raised from time to time" but admitted that there was "no record of a change in tolerances for rough machining the cams." (R. 41) He then reached the "conclusion" that "while the use of the Walcott lathes may have been the occasion for adding the straightening operation, it was not the underlying cause for doing so, the operation being rather attributable to improvement in defendant's standards of workmanship." (R. 41)

2. Although he was convinced that "the operation was actually added when the infringing machines were installed," he rejected the cost thereof "on the ground that its addition was not attributable to differences between the two machines." (R. 41). The Court of Appeals apparently was largely swayed by this finding (if it be a fact finding instead of an erroneous conclusion—see *U. S. v. Esnault-Pelterie*, 303 U. S. 26 at page 31) of the Master (R. Vol. V, p. 20).

3. That "defendant could have made the Walcotts exactly like the shapers with regard to the necessity of straightening by simple changes with respect to steady rests."

4. While recognizing the rule of *Tilghman v. Proctor* he refused to follow it for the stated reason that "in making a comparison between two types of machinery similar factors on both sides should be kept constant and the actual operation of the infringing machine should not be weighed against a theoretically ideal operation of the standard of comparison." (R. 41-42) These points we shall consider in the order stated.

1. There Was No Change In Petitioner's Standards of Workmanship or Manufacturing Tolerances When the Straightening Operation Was Added.

There is no controverted question of fact on this point, nor is there any question of credibility of witnesses. The evidence is clear,—direct and unequivocal testimony supported by contemporaneous documentary proofs. The

Master apparently realized that if he allowed the cost of the straightening operation there were no profits, because respondent's accountant Moise had frankly admitted that if the straightening operation was needed with the Walcott machines and not with the shapers it should be included as a part of the cost (R. 268) and that his figures for profits should be changed to loss (R. 270-271, 275). The Master, therefore, interjected on his own volition the matter of the raising of petitioner's standards of workmanship by propounding a series of questions to the witness Pioch on this point (R. 672, 673). Fortunately the Ford Company kept records on this particular matter. We produced the witness Weyl (R. 891, 925), who brought with him the Ford Company's Engineering Information Cards (Ex. 290, R. 1596-1602). The Master inquired as to the purpose of producing such cards and attempted to point out that the cards would not conclusively answer the question as to whether or not the straightening operation had been added because of reducing the tolerances (R. 913). Counsel pointed out to the Master that he was wrong in this respect and then had the witness testify. The Master again propounded several questions to this witness in an effort to have him admit that changes in tolerances might have been made by the foremen without changing the record on the cards (R. 915, 916). The testimony of the witness was very positive that the Production Department and the foremen therein could not make any changes in tolerances unless there was authorization for a change in the drawing and also for a change in the engineering card so that a record of the change would be established as of the date of such change. Indeed, even if there had been a change in general manufacturing tolerances such a change would not ordinarily be reflected

in the rough turning of the cams for which the infringing machines were employed but would appear primarily only in the finish sizes of the work piece. The Master, apparently realizing this, endeavored to have the witness state that "nobody would particularly care whether the tolerances in the rough turning were changed or not" but the witness stated:

> "Well, you say nobody would care but still the law is they should notify us that they want that changed. We have to hold that because otherwise they would make all kinds of changes and we wouldn't know anything about them." (R. 916)

Referring to the actual record it will be seen, by reference to defendant's Ex. 290-11, (R. Vol. IV, p. 1601) that there is a record of a change on 3/11/24 at about the time when the infringing machines were being acquired and installed (See Tabulation Col. 4, R. 162). The change contained on the Engineering Information Card No. 6 (Ex. 290-11) shows that the "rough turning" dimension was changed from the upper and lower limits of 1.958" and 1.962" respectively to the upper and lower limits of 1.771" and 1.775" respectively. The contemporaneous written documentary evidence, therefore, clearly shows that there was absolutely no change in the tolerances or manufacturing standards at this time, for as stated by the witness, *"the tolerances still remained four thousands."* (R. 918).

An examination of the remaining items contained in the Engineering Information Card (Ex. 290-12) will show that up to the date of 6/14/26 there were no further changes that have anything to do with the dimensions, or tolerances, for the rough turning of the cams. If there

had been any such changes *"it would show on the cards"* as positively testified to by the witness (R. 918).

There is no testimony in the record, other than that which we have referred to above, on the matter of change of tolerances or the raising of the standards of workmanship during respondent's manufacture of the Model T car. The Master's conclusion, therefore, that the addition of the straightening operation was "rather attributable to improvement in defendant's standards of workmanship" is not only not in the slightest degree supported by the record, but is clearly erroneous and directly contradictory thereto. What stronger or more conclusive proof on this subject could be made than the documentary evidence as contained in the Engineering Information Cards (Ex. 290) which were kept by respondent for the very purpose of having a record of dimensional changes and tolerances with respect to the very operation of rough machining the cams of the camshafts?

2. The Necessity for Adding the Straightening Operation Was Clearly Attributable to the Inherent Mechanical Differences Between a Lathe and a Shaper.

Respondent has urged that the burden of proof was on petitioner to prove that the additional operation was made necessary because of differences between the infringing lathes and the standard of comparison shapers. It is not denied by respondent that the straightening operation was *not used* when the shapers were employed by petitioner, nor is it denied that the operation *was added* when the infringing machines were used. Any experienced

machinist knows that the inherent differences in the mode of operation between a lathe and a shaper would clearly compel that if a shaft, to be turned in a lathe, is in a bowed, or unstraightened condition, before it is placed in the lathe, it *must be straightened before it can be properly turned.* In the infringing lathes the shaft rotates at approximately 220 revolutions per minute (R. 553) and the tool in the lathe attacks the work tangentially. (See Figs. V-XI, sheets 3 and 4 of the Melling patent No. 1, 655,655) (R. Vol. IV, pp. 1560, 1561). If there were any appreciable bow in the shafts it would be disastrous to attempt to turn them in the infringing machines, because the eccentricity of the bowed part of the shaft would inevitably cause the tool to gouge into the work and either rip the shaft out of the machine (R. 772) or break the tool—this would be greatly accentuated because of the eccentricity of the nose portion of the cams.

In the shaper, the shaft rotates very slowly and the tools do not attack the work tangentially but *directly by pressure upon the top* in such a way that they necessarily tend to press the work piece down on the supporting steady rests. (See Ex. 53, R. 1688 and Ex. 53-B, R. 1689). The Exhibits speak for themselves in this respect and the physical facts are uncontrovertible.

These facts are also fully established by the record evidence. As we pointed out in our Main Brief on this subject, the witness, Aptekar, gave precisely the reason, we have given above, why it was not necessary to use the straightening operation on the *shapers,* because in the shaper the tool is always on top of the shaft *pressing it against the supporting base* (R. 536). He testified further

on the subject at page 543 to 558, inclusive, where he explained time and again the action of the shaper to be such as to perform an automatic straightening of the shaft.

The witness Pioch's testimony on the straightening (R. 652-658, 669-673) was clear as to the downward pressure of the tools thereon (R. 671). He stated that the straightening operation with the Walcott machine was "added to eliminate the many troubles that they had with those machines, to help the machines produce" (R. 658).

The witness Brush (a practical mechanic as well as an engineer) testified fully on the subject. He first described the tangential action of the tool with respect to the work in the infringing Walcott machines (R. 766 to 769) and illustrated his testimony with a sketch, Exhibit 272 (R. 1586). He then discussed the physical operation of the shaper tool (R. 769 to 772), and illustrated that testimony with a sketch, Exhibit 273 (R. 1587) and stated that the necessity for a straightening operation of the shafts in the infringing Walcott machines would not be modified "a bit" by the use of additional steady rests (R. 772).

Even respondent's financially interested witness Gordon, when asked his opinion concerning the necessity for the straightening operation on the Walcott machine but not on the shaper (R. 1205), corroborated completely that which we have fully discussed above, that in "the Ford shaper the pressure of the tool tended to push that (the shaft) down" (R. 1206). He next stated that "it would have been a proper operation to have the shaft straight when it went into the machine in the first place regardless of the type of machine" (R. 1207), as to which we have

no disagreement. He refused to admit categorically that there would be some difference between the machines, although he admitted the possibility thereof (R. 1207).

There is not therefore, as contended in respondent's brief, any "question of fact that was sharply disputed" (Br. p. 58) or "a sharp dispute in the testimony" (Br. p. 61). Instead, the testimony of respondent's own witnesses Gordon (R. 1206-7) and Sloniker (R. 312), clearly established the *necessity* for using the straightening operation with the Walcott lathes and does not in the slightest degree deny or even question the established fact that it was not used on the shapers.

3. The Suppositious Change in the Infringing Machine for the Hypothetical Elimination of the Straightening Operation.

Even though it may be the fact that changes might have been made in the infringing machines that would have eliminated the necessity for the use of the straightening operation, the rejection of the cost thereof and the failure to allow a deduction to petitioner for the monies actually expended by it for the performance of such operation during the infringing period, is not a fact finding but a ruling on a point of law that is directly contra the rule of *Tilghman v. Proctor* that an infringer is liable for *actual and not possible gains.* In other words, it is the same sort of a thing as presented to this Court in the old case of *Dean v. Mason,* 20 How. 198, 61 U. S. 198, wherein this Court ordered the reversal of a decree based on a Master's report of estimated profits "which the defendant

with reasonable diligence, might have realized." (61 U. S. 203). But, even as a fact finding, the Master's statement that "the defendant could have made the Walcotts exactly like the shapers with regard to the necessity of straightening by simple changes with respect to steady rests" (R. 41) is clearly erroneous. This statement, adopted by the Court of Appeals as follows:

> "That the infringing machines could have been made to operate precisely as the shapers with the installation of steady rests which would have eliminated the additional straightening operation." (R. Vol. V, p. 20)

was clearly based by the Master upon the following which immediately preceded it:

> "Brush and Pioch, defendant's principal experts, both testified that the necessity of straightening could have been eliminated by modification of the steady rest or the addition of other steady rests." (R. 41)

The witness Brush on this subject, stated categorically (R. 770-2) that the action of the tool on the work piece in the lathe would not be in any way influenced, or modified, by the number of steady rests that were used, although he stated that if a three point steady rest were employed instead of a two point steady rest, with the rollers properly spaced, the necessity for straightening a work piece to eliminate a general bow therein would not apply; (R. 808-9) the witness Pioch's testimony on this point was that if three steady rests had been used in the Walcott machines it "very likely" would have avoided the necessity for the straightening. (R. 672).

On cross-examination Brush and Pioch went no further than admitting the *possibility* of the elimination of the straightening operation and their testimony was not, as stated by the Master and the Court of Appeals, that the straightening operation "could," or "would," have been eliminated, nor was the testimony to the effect that the Walcott lathes "could have been made to operate precisely as the shapers," as stated by the Court, or "exactly like the shapers," as stated by the Master.

The above testimony is a far cry from supporting the finding that the infringing Walcott lathes could be made to operate "precisely" or "exactly" like a shaper. Even though changes in the infringing machines *might have eliminated* the necessity for using the straightening operation, the fact remains that the suggested problematical changes never were resorted to by petitioner. Nor was any burden placed on it under the law to make these changes, particularly when the suggestions therefor were not made until many years after all operation of the infringing machines had ceased. To hold otherwise is to hold that this Court did not mean what it said in *Tilghman v. Proctor,* but that the language thereof must be given precisely the opposite of its clear and unequivocal meaning and import, and as if it read "*the profits which an infringer must account for are not those which he did make but those which he might reasonably have made and that the expense of using the new process is doubtless to be ascertained by the manner in which the defendants might have conducted their business and not by the manner in which they have in fact conducted it.*"

4. "In Making a Comparison Between Two Types of Machinery Similar Factors On Both Sides Should Be Kept Constant and the Actual Operation of the Infringing Machine Should Not Be Weighed Against a Theoretically Ideal Operation of the Standard of Comparison."

Both the Master (R. 41, 42) and the Court of Appeals (R. Vol. V p. 20) recognized the rule of *Tilghman v. Proctor* but both refused to follow the rule, the Master stating first that "in making a comparison between two types of machinery similar factors should be kept constant" and secondly "the actual operation of the infringing machines should not be weighed against a theoretically ideal operation of the standard of comparison." The Court of Appeals based its ruling solely upon the *presumption* in favor of the Master's report. To say that similar factors, on both sides should be kept constant is to deny the rule of *Tilghman v. Proctor* for if an additional straightening operation which undeniably *was used* in the use of the infringing machines as the Master and the Court of Appeals found, and *was not used* when the standard of comparison machines were employed, *there are no similar factors to be kept constant.* The refusal to make allowances for the cost of the additional operation therefore constitutes a complete disregard of the unequivocal statement of this Court in *Tilghman v. Proctor* that the infringer is liable for *actual* and not for *possible* gains.

5. Petitioner Clearly Carried the Burden of Proving the Necessity for the Straightening Operation and of Satisfactorily Explaining It.

In *Elizabeth v. Pavement,* 97 U. S. 126, this court affirmed the report of a Master in refusing to allow a certain deduction

> "claimed to have been profits made upon other work which were allowed to be included in these contracts. As this is not explained in any satisfactory way, we think the Master did right in rejecting it" (97 U. S. 126 at 142).

Respondent in its brief relied upon the last sentence contained in the above quotation. We submit there is a vast difference between a claimed deduction which *"is not explained in any satisfactory way"* and one with respect to which the proofs are as clear, convincing and uncontradicted, as are petitioner's proofs concerning the deduction it claimed for the cost of the straightening operation. There is no disputing the evidence that the operation was actually used. Respondent did not attempt to deny this fact and both the Master and the Court of Appeals found the fact to be that it was used. The fact that it *was not used* on the shapers and *was used* on the infringing machines was clearly established by *contemporaneous documentary evidence,* the operation sheets or time studies, Exhibits M (R. 1432-33) and Exhibit N (R. 1434-35). The authenticity of these records was fully established by the witnesses Libby (R. 436-460) and Marentette (R. 486-495), both of whom showed their familiarity with the operation of the machines and testified that the

data contained on the time studies jibed with their own recollections. The witnesses Shawkey and Myers testified that *the straightening operation was required immediately before the shafts were inserted in the Walcott lathes* (R. 429-486). The following witnesses also testified that *the straightening operation was not required before the shafts were placed in the shaper*: Libby (R. 441) and Oberhoffken (R. 1111). In addition, the following witnesses testified that the straightening operation *was required with the Walcott but not with the shapers* Wibel (R. 500-501); Aptekar (R. 534-539, 543, 545-547); Pioch (R. 652-656) and Brush (R. 762-772). The witnesses Aptekar, Pioch and Brush explained fully and clearly *why* the operation was needed when the Walcott lathes were used and *why* the operation was not needed when the shapers were used. A consideration of the mechanical facts as hereinbefore discussed (*supra* pp. 20-23) exemplifies fully the correctness and accuracy of the full explanations given by the last-named witnesses. In addition, the witness Hunt also testified (R. 564) concerning the automatic straightening operation of the tools in the shaper. Hunt's testimony agreed completely with the explanations given by Aptekar, Pioch and Brush as to why the straightening operation was not required when the shapers were used.

We have therefore ten witnesses produced by petitioner on this question. Their testimony was not contradicted or controverted in the slightest degree. Respondent offered no evidence nor has it ever attempted to deny the fact that the operation *was not used on the shapers but was used on the Walcott.*

All we have from respondent on the subject is the testimony of the witnesses Sloniker and Gordon—both stated

that it was the *usual practice* to employ a straightening operation before a shaft is placed in any machine. This testimony is therefore corroborative of the necessity for the use of the operation when the Walcott lathes were employed. Gordon admitted the possibility of the shaft being pushed down onto the steady rests in the shapers. Petitioner fully met not only the burden of proving the fact by an overwhelming preponderance of evidence, but proved it beyond a reasonable doubt.

We submit, therefore, that as respondent's own accountant admitted all of his figures of account showing an alleged profit would be converted into a loss, if due allowance were made for the straightening operation (R. 268, 270-1, 275), and that as the Master and the Court of Appeals also found that petitioner's figures showed a loss and not a profit, if due allowance is made for the cost of the straightening operation, the situation presented in this case is that there is *no proof of damages,—or no proof of profits,* consequently, the only award that can properly be made is one of *nominal damages only.* Anything more *would not do substantial justice,* would result in a payment of money to respondent to which it is not *justly entitled under the statute* and would result in inflicting an *unauthorized penalty upon petitioner.* (*Sheldon v. Metro-Goldwyn-Mayer, supra.*)

POINT 3. ON THE PROPOSITION THAT RESPONDENT OFFERED NO PROOF TO SHOW WHAT PART OF PETITIONER'S ALLEGED GAINS WERE DUE TO RESPONDENT'S PATENT, AND WHAT TO PATENTABLE IMPROVEMENTS THEREON NOT THE PROPERTY OF RESPONDENT, WHEREAS, PETITIONER'S EVIDENCE DID SO DISCRIMINATE.

On the question of apportionment we are utterly unable to comprehend why petitioner should be placed in any different position than the defendant in any one of the cases of *Mason v. Graham, supra*; *Westinghouse v. Wagner, supra; Dowagiac Mfg. Co. v. Minnesota Moline Plow Co., supra; Sheldon v. Metro-Goldwyn-Mayer, supra,* or *Egry v. Standard, supra.* In *Mason v. Graham,* although this Court held that the defendant's infringing devices must be considered *"as practically the same as that patented to the complainant"* (90 U. S. 275), it was shown in that case that certain savings in the manufacture of the infringing devices were effected by the use of an improvement "of the defendant's own devising," and this Court properly held

> "Manifestly the complainants are not entitled to the savings or profits resulting from the defendant's own invention" (90 U. S. 277).

In *Westinghouse v. Wagner,* claim 4 of the patent covered the entire construction that was made by the defendant. Defendant, however, used intervening spaces in the coil that formed part of the entire subject matter covered

by the claim. The Master had held that as the entire commercial value of the transformers was due to the invention covered by claim 4, all of the profits belonged to the Westinghouse Company (225 U. S. 622). The Court below held that the defendant's additions were not infringements and had contributed to profits and as plaintiff had failed to make a separation it was entitled only to nominal damages. This Court in the Westinghouse case set forth four rules with respect to the burden of proof on the question of profits in a patent infringement account (225 U. S. 614-5). Without repeating these rules it suffices to say that the instant case falls squarely under Rule (d).

In the case at Bar respondent has urged that the patent in suit covered the lathe as an entirety and relied heavily upon Claim 2 thereof. In this respect the situation is precisely similar to that in the case of *Dowagiac Mfg. Co. v. Minn. Moline Plow Co., supra,* wherein the claim of the patent covered the general combination. This Court, however, in that case referred to the language of the patent to the effect that the invention related to "new and useful improvements in grain drills." Precisely the same language is used in the Gordon patent in suit, wherein the preamble to the specification states that Charles Gordon and Alfred W. Redlin "have invented certain new and useful improvements in lathes."

Respondent quoted in its brief (p. 12) the following statement of the Court of Appeals from the decision on appeal from the main case of infringement, *Ford Motor Company v. Gordon Lathe Company,* 87 F. 2d, 390, 391: 390, 391:

> "Full consideration thereof brings conviction of its insufficiency to warrant modification of our previous conclusion that the patentees were *pioneers* * * * "

but respondent did not quote the language which immediately followed and which explains the *one and only detail of "pioneership,"*—to-wit:

> "in disclosing means for oscillating the tool in synchronism with its reciprocating movements by the use of an appropriate shaped cam, movable frame and bell crank lever tool support."

Gordon's invention, therefore, had to do solely with but a single feature, the use of a *tilting tool* in a lathe and the *means for tilting it. Gordon was not the first inventor of a lathe.* It is perfectly evident from an examination of the Gordon patent, that the bed, or frame, was not new, the head stock and tail stock were not new, the means for driving the head stock was not new, the means for feeding the tool carriage was not new, nor were the gears for effecting the drive of the head stock and feed of the carriage new. Gordon's pioneership, as stated by the Court of Appeals, was clearly limited solely to the tool tilting means. So the situation here is on all fours with the *Dowagiac* case, where this Court held the improvement to reside solely in the "seeding part of a grain drill—the part which opens the furrows, guides the seed into them and then closes them" (235 U. S., 645 et seq.).

In the *Dowagiac* case the Court stated that the plaintiff did not conform to the rule of *Westinghouse v. Wagner,* as

> "It neither submitted evidence calculated to effect an apportionment nor attempted to show that one was impossible; and this, although the evidence upon the accounting went far towards showing that

there was no real obstacle to a fair apportionment. Certainly no obstacle was interposed by the defendants. (235 U. S. 646, 647). * * * * *

As was said in Tilghman v. Proctor (125 U. S. 136, 145), 'it is inconsistent with the ordinary principles and practice of courts of chancery, either, on the one hand, to permit the wrongdoer to profit by his own wrong, or, on the other hand, to make no allowance for the cost and expense of conducting his business, or to undertake to punish him by obliging him to pay more than a fair compensation to the person wronged' " (235 U. S. 647).

Nothing could be more apposite to the situation in the instant case than this language of the Court.

In the *Egry* case the Sixth Circuit Court of Appeals in refusing to allow any profits correctly held that—

"An apportionment being necessary, *the burden is upon the plaintiff to make it, or show a sufficient excuse for not doing so* * * * but there was no effort by plaintiff to utilize expert testimony for this purpose * * * "

"We do not understand the Westinghouse case as holding that, in every case where the profits cannot be apportioned, defendant must pay them all. * * * "

"Defendant may well be penalized with the entire profits, when his failure to keep apportionment records which might have been kept is at the base of the confusion; not so, we think, *when no possible keeping of records by defendant would have minimized the uncertainty.* * * *" (23 F. 2d, 442.) 442.)

Here again the language is particularly appropriate to the case at Bar.

In the case of *Sheldon v. Metro-Goldwyn-Mayer, supra,* this Court held that to make an award of profits which have been shown not to be due to the infringement

> "would be not to do equity but to inflict an unauthorized penalty" (309 U. S. 390).

But there it was argued that without the plot there would have been no play. Here it is argued without Gordon's tilting tool there would have been no Walcott machine. (As to this see pp. 64-65 of our "Brief for Petitioner.")

In the instant case, the only reason given by the Master for failing to apportion the profits was,—that between the alternative of giving the plaintiff all of the profits or giving it none, he preferred the former as the "fairer result" (R. 71), while the Court of Appeals based its opinion that respondent was entitled to all of the profits on the stated ground that

> "the Gordon Company, having shown commingling of profits by the Ford Company, and it appearing that the latter company failed to keep records or supply evidence that would disclose what proportion of the profits arose from the infringing device and what proportion, if any, from Melling improvements, the burden again returned to the Ford Company, which it has failed to carry, and such failure creates an unavoidable liability" (citing Horvath v. McCord, 100 F. 2d, 326).

We deny the correctness of the statement that there was any commingling of profits by the Ford Company and we refer to the holding of the Master that "*the confusion is not related to the books at all*" (R. 71), and his

further more detailed discussion of petitioner's accounting and record keeping system (R. 91-92). We insist that the situation here is one akin to that in the *Egry* case —one wherein "*no possible keeping of records by defendant would have minimized the uncertainty.*" The statement by the Court below that "the Gordon Company having shown commingling of profits" is therefore not in accordance with the facts or the record. Likewise it is not in accordance with the record to state that "the Ford Company failed to supply evidence that would disclose what proportion of the profits arose from the infringing device and what proportion, if any, from Melling improvements."

The Master, after discussing the two additional patentable Melling improvements included in the infringing machines, made the unequivocal fact finding—

> "It seems clear without these two improvements no savings would have been realized by the defendant, at least by comparison with the shaper" (R. 62).

Although the Master correctly stated the facts to be

> "That plaintiff submitted no evidence to separate the respective contribution of the two patents, relying upon its legal contention that the doctrine of apportionment is not applicable here."

He then incorrectly stated—

> "Defendant's evidence on the issue consisted almost wholly of expert testimony that, since the Gordon machine was not operable on the Ford camshaft, one hundred percent of the value of the infringing machine to defendant was attributable to the Melling improvements."

The Master was clearly mistaken in this respect, for defendant's expert did not so testify. His testimony on this subject was as follows:

> "Q. (By Mr. Farley): Insofar as the operation of the Gordon machine and the Walcott machine at the Ford plant are concerned, Mr. Brush, what proportionate *increase of efficiency* do you think would be attributable to the Walcott machine *because of these differences that you have just discussed such as outlined in the claims of the Melling patent?* A. *Just* 100 *percent.*
>
> The Master: Well, what do you mean?
>
> A. I mean, the difference.
>
> The Master: You don't mean you can make any mathematical computation?
>
> A. No. What I mean is—I spoke in the vernacular—these differences in the movements are the things that make *all the difference in the behaviour of the two machines on the same work piece. And, if I understood Mr. Farley's question, he was referring particularly to these differences as defined in the claims of the Melling patent.*" (R. 794)

Surely this was direct evidence on the very point. And respondent offered nothing to controvert it. There is, however, additional evidence in the record, first, as to the two cut mechanism as to which Gordon admitted that Melling was "smarter" than he was (R. 387-8). The Master rested his finding on this point that as Claim 2 of the patent includes the element of "means for simultaneously causing relative movement between the work holder and tool holder axially with relation to the tool holder", the claim covered this feature (R. 62). As to this, however, we direct attention to *Marconi v. U. S.*, 63 S. Ct. 1393, wherein this Court held that findings that certain "apparatus coming within the terminology of Claim 16 * * *

and infringe Claim 16, give no aid in solving this problem" (apportionment).

We submit that petitioner in offering the testimony above quoted of the witness Brush fully met the burden of going forward with the proof as required by Rule (d) of *Westinghouse v. Wagner, supra.* If Brush's testimony was either untruthful or incorrect, the burden was squarely placed upon respondent to disprove it. At any rate, it stands uncontradicted in the record.

There was further evidence, however, on this point to which we direct the Court's attention, and we refer the Court to paragraphs numbered 34, 35, 36 and 37 (R. 134) of the first Master's Order for Statement of Account (R. 132, 137) and defendants' answer thereto (R. 144-146), which relate to petitioner's use of the patented Gordon machine during the many months it was in the Ford plant. In defendants' answer 37 (R. 146) and Exhibit 11 referred to therein (R. 158-159) it was shown that the output of the patented Gordon machine when defendant attempted to use it for machining its Fordson tractor camshafts was but five shafts per hour. The Master found the infringing Walcott machines to have an output of twenty Fordson tractor camshafts per hour. Respondent's counsel, Mr. Spohn, in the hearings before the Master, admitted the truth of the answers (including answer 37) relating to petitioner's use of Gordon machine, but objected to them as being totally irrelevant (R. 350-351). We submit, therefore, that petitioner did meet its burden of going forward with the evidence, and that therefore the burden was then shifted to respondent. Respondent, however, made absolutely no effort to go forward with any further evidence on this point. Instead, it claimed,

and still claims, to be entitled to an award of all of the alleged profits which clearly resulted from the additional patentable improvements of Melling. In view of the foregoing we submit the holding of the Sixth Circuit Court of Appeals that petitioner

> "failed * * * to supply evidence that would disclose what proportion of the profits arose from the infringing device and what proportion, if any, from Melling's improvements"

is clearly in error.

We further submit that the situation in the instant case is on all fours with that in *Coupe v. Royer*, 155 U. S. 565, wherein this Court, after discussing the rule of *Tilghman v. Proctor*, stated:

> "If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits" (155 U. S. 583).

and held that the District Court

> "applied the wrong standard in instructing the jury that they should find what defendants *might* be shown to have gained from the use of the patented invention."

The Court then stated the failure to follow *Tilghman v. Proctor* resulted in estimating "what the defendant's profits *might* have been and not what they actually were" (155 U. S. 583), and this Court then held:

> "Upon this state of facts, the evidence disclosing the existence of no license fee, no impairment of the plaintiff's market, in short, no damages of any kind, we think the Court should have instructed the jury, if they found for the plaintiffs at all, to find nominal damages only."

Precisely the same situation is presented here. There were no profits at all if the rule of *Tilghman v. Proctor, supra, Coupe v. Royer, supra,* and *Dean v. Mason, supra,* is followed. No impairment of respondent's market resulted from any act of petitioner, as respondent was given every possible opportunity to prove the value of his machine to petitioner. We submit, therefore, that the present case is one where, under the rule of *Coupe v. Royer,* an award of nominal damages only should be made.

This Court has *never* before held in any case that a plaintiff could recover profits resulting from contributions made by others.

In *Black v. Thorne,* 111 U. S. 122, it stated:

> "It does not always follow, that because a party may have made an improvement in a machine and obtained a patent for it, another using the improvement and infringing upon the patentee's rights will be mulcted in more than nominal damages for the infringement" (111 U. S. 124).

Again in the *Dowagiac* case this Court said that in a patent infringement case

> "* * * the normal measure of damages was the value of what was taken. * * *" (235 U. S. 648).

What was the value of what was taken in the case at bar? We submit it can be no more than that value which Gordon himself placed upon his invention, namely, 10 per cent of the sales price of his own patented machine, which covered the manufacture and sale as well as the unrestricted use thereof. This, we submit, is the maximum. But even as to this its value to petitioner without the Melling improvements was less than nothing, as the cost of the

use of the Gordon machine to petitioner without Melling's improvements was prohibitive—$2.40 per camshaft!—(See Exhibit 11, R. 159.) The amount of $206,824.22 does not in the slightest degree represent profits to which complainant *is justly entitled* nor the *"value"* of Gordon's invention to petitioner, but results, not in doing justice, as stated by this Court, in the *Sheldon* case, but in inflicting an unauthorized penalty on this petitioner.

CONCLUSION

We therefore submit that as the opinion below decided great questions of public importance in direct conflict with the authoritative rules of law established by this Court and, if the judgment below is permitted to stand, it will result in grave injustice to petitioner, this petition for rehearing should be granted, the opinion below reviewed, the judgment reversed, and the case remanded for such further action as to this Court may seem proper.

Drury W. Cooper,
I. Joseph Farley,

Counsel for Petitioner.

CERTIFICATION

Counsel for petitioner hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purpose of delay.

Drury W. Cooper,
I. Joseph Farley,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 49

No. 50

FORD MOTOR COMPANY, *Petitioner*,

vs.

GORDON FORM LATHE COMPANY, *Respondent*.

PETITION TO STAY MANDATE

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Ford Motor Company, respectfully states that in view of the order in this cause entered December 6, 1943, of a *per curiam* affirmance of the judgments below by an equally divided court, it is filing a petition for rehearing in accordance with the provisions of Rule 33 of this court; and petitioner therefore respectfully prays that the issuance of the mandate herein be stayed until this Honorable Court has passed on the petition for rehearing, and if the petition for rehearing is granted, the issuance of said mandate be further stayed until after the rehearing and final determination thereof by this court.

DRURY W. COOPER,
I. JOSEPH FARLEY,
Counsel for Petitioner.